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No. 06-1418

In the Supreme Court of the United States

THOMAS CHRISTIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion by refusing to consider petitioner's claim that his conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) was invalid, where petitioner did not raise that claim in his opening brief on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the *Federal Reporter* but is reprinted in 208 Fed. Appx. 332.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2006. A petition for rehearing was denied on January 22, 2007 (Pet. App. A11). The petition for a writ of certiorari was filed on April 23, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of possessing child pornography, in viola-

tion of 18 U.S.C. 2252A(a)(5)(B) (2000 & Supp. IV 2004). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A10.

1. An investigation conducted by Immigration and Customs Enforcement (ICE) of the Department of Homeland Security revealed that petitioner had purchased access to Internet web sites containing child pornography. In March 2004, ICE Agent James Podboy applied for a warrant to search petitioner's residence. In the supporting affidavit, Agent Podboy stated that he had probable cause to believe that evidence of child pornography would be found at petitioner's residence. The affidavit set forth facts supporting that belief and attested to the results of a criminal-history check revealing that petitioner had prior convictions for oral sexual penetration of a child less than thirteen years old and interstate transportation of child pornography. A magistrate judge issued a search warrant for the "[r]esidence of Thomas Christie at 3418 Seminole Drive, Shreveport, Louisiana 71107," authorizing the seizure of computer equipment containing child pornography, related records, and credit-card information, among other things. Pet. App. A1-A3; Gov't C.A. R.E., Tabs 5, 6.

When the search warrant was executed, agents seized three hard drives containing child pornography from two computers located inside petitioner's residence. Two of the hard drives were from a computer located in the living room and guest bedroom, while the third hard drive was from a computer located in an interior room that was set up as a business office. Pet. App. A3.

2. A grand jury sitting in the Western District of Louisiana charged petitioner with one count of pos-

sessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (2000 & Supp. IV 2004) (count 1), and a related forfeiture count (Count 2). Pet. App. A3 & n.1; Gov't C.A. R.E., Tab 3.

Petitioner moved to suppress the evidence of child pornography found on the hard drive taken from the computer in the office. He argued that the office was used for a construction business that he co-owned with another individual, and that it fell outside the scope of the search warrant. Petitioner did not seek to suppress the other two hard drives seized from his house. After holding an evidentiary hearing, the magistrate judge issued a report and recommendation denying the motion to suppress. The judge concluded that the business office was not a separate structure but simply a room within petitioner's residence, and that the warrant had authorized agents to search that room. The district court accepted the magistrate judge's conclusions and denied the motion to suppress. Pet. App. A3-A6.

Thereafter, petitioner entered a conditional plea of guilty to count 1 under Federal Rule of Criminal Procedure 11(a)(2), reserving his right to appeal the district court's denial of his motion to suppress. Count 2 was dismissed on the government's motion. Pet. App. A3 n.1; Gov't C.A. R.E., Tab 9. The district court accepted petitioner's conditional guilty plea. Pet. App. A6.

Because he previously had been convicted of a sexual offense involving a minor and interstate transportation of child pornography, petitioner faced a statutory minimum sentence of 120 months of imprisonment. See 18 U.S.C. 2252A(b)(2) (2000 & Supp. IV 2004). The court sentenced petitioner to that statutory minimum prison term, to be followed by five years of supervised release. Pet. App. A6.

3. On appeal, petitioner filed an opening brief in which he renewed his claim that the agents had exceeded the scope of the search warrant by searching the office inside his residence. Pet. App. A6. In its brief, the government contended that the court should dismiss the appeal because the unchallenged evidence found elsewhere in petitioner's residence was sufficient to support the guilty plea, and, in any event, the district court had correctly denied the motion to suppress. Gov't C.A. Br. 11-23. Petitioner then filed a supplemental brief arguing that his conditional guilty plea was not valid and should be vacated. He contended that Rule 11(a)(2) permits only case-dispositive pretrial issues to be preserved for appeal, and that, according to the government's argument on appeal, the suppression of evidence seized from petitioner's business office was not case-dispositive. Pet. C.A. Supp. Br. 1-3.

The court of appeals affirmed. Pet. App. A1-A10. The court upheld the denial of the motion to suppress, concluding that the agents had acted within the scope of the search warrant when they searched the office located in petitioner's home. *Id.* at A6-A9. The court declined to consider petitioner's challenge to the validity of his conditional guilty plea, finding that petitioner had waived that claim by not raising it in his opening brief. *Id.* at A9-A10 (citing *United States* v. *Ogle*, 415 F.3d 382, 383 (5th Cir.), cert. denied, 546 U.S. 1079 (2005)).

ARGUMENT

Petitioner contends (Pet. 4-8) that his guilty plea was invalid because it purported to reserve the right to appeal an issue that was not case-dispositive. The court of appeals appropriately declined to consider that argument because petitioner did not raise it in his opening

brief. Petitioner does not contend that the decision below conflicts with any decision of this Court or any other court of appeals. Moreover, petitioner received the benefit of his plea bargain when the court reviewed the merits of his suppression claim; he therefore could not have been prejudiced by any error in accepting his plea. Further review is not warranted.

1. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have uniformly interpreted that provision to establish a general prudential rule that an appellant forfeits an issue by failing to raise it in his or her opening brief.[1] That rule promotes judicial economy by avoiding piecemeal briefing of appeals. Cf. *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985).

Petitioner does not dispute that the argument advanced in his petition for a writ of certiorari was not presented in his opening brief in the court of appeals.

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[1] See, *e.g.*, *Playboy Enters., Inc.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir.), cert. denied, 534 U.S. 980 (2001), and 534 U.S. 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

The court of appeals did not abuse its discretion by refusing to consider that argument when petitioner presented it in a supplemental brief.

2. Petitioner relies heavily (Pet. 4-7) on what he describes as the government's concession, in its answering brief, that the suppression of evidence from petitioner's office was not a case-dispositive issue. It is true that a valid conditional guilty plea under Rule 11(a)(2) preserves only case-dispositive pretrial issues for appellate review. See *United States* v. *Bundy*, 392 F.3d 641, 645-647 (4th Cir. 2004); *United States* v. *Bell*, 966 F.2d 914, 915-916 (5th Cir. 1992). But the government's position on whether an issue is case-dispositive is not determinative. See *Bundy*, 392 F.3d at 648 ("[T]he ultimate decision belongs to the district court, and it need not accept the Government's position as a matter of course.").

In any event, petitioner was already aware that the two unchallenged hard drives from the computer in the living room and guest bedroom contained child pornography.[2] He therefore was aware that the validity of the search of his office was not a case-dispositive issue. And all of the cases on which petitioner now relies for the proposition that a conditional plea preserves only case-dispositive issues predated the filing of petitioner's opening brief in the court of appeals. In other words, at the time he filed his opening brief, petitioner had notice of both the factual and the legal basis for his Rule 11

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[2] For example, the factual basis for petitioner's guilty plea specified that images of child pornography were found on both computers; petitioner conceded that fact. See Gov't C.A. Br. 11. And petitioner acknowledged in his opening brief that "incriminating evidence was found on another computer that was not within the business office." Pet. C.A. Br. 5.

argument. Petitioner has presented no basis for excusing his failure to raise that argument.

3. The Court should deny the petition for the additional reason that petitioner has already received the benefit of his plea bargain. Thus, even if the district court erred in accepting petitioner's plea, petitioner has not been prejudiced. See Fed. R. Crim. P. 11(h); *United States* v. *Vonn*, 535 U.S. 55, 63 (2002). The rule that a valid conditional guilty plea preserves only case-dispositive issues primarily serves judicial interests, not the interests of defendants. It "is a safeguard against unnecessary appellate litigation and inadequate appellate review" and "a protection against superfluous proceedings in the district court." *Bundy*, 392 F.3d at 647.

Here, petitioner entered into a knowing and voluntary guilty plea in which he reserved the right to appeal his suppression claim. The court of appeals reviewed that claim on the merits, thereby giving petitioner the complete benefit of his plea bargain. Having obtained review of the issue he sought to preserve for his appeal, petitioner should not receive the additional benefit of having his guilty plea vacated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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